***The Consumer Finance Podcast*:**
CFPB and DOJ Joint Statement on Immigration Status and Credit Underwriting
Host: Chris Willis
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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice, and I'm glad you've joined us today for my discussion about the consideration of immigration status and credit underwriting. But before I jump into that topic, let me remind you to visit and subscribe to our blogs, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And don't forget about our other podcasts. We have lots of them. We have the *FCRA Focus*, all about credit reporting. We have *Unauthorized Access*, which is our privacy and data security podcast, *The Crypto Exchange*, which is about everything to do with crypto, and our newest podcast *Payments Pros*, which is all about the payments industry and the regulation covering that.

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Now, as I said today I'm going to be talking about a recent statement jointly released by the CFPB and the Department of Justice on what's been kind of a difficult issue for creditors over the past number of years, and that is the consideration of immigration status in credit underwriting. Now the thing is, that statement came out from the DOJ and the CFPB in October, but that's really not the beginning of this story. In order to appreciate where the industry is and has been with respect to this issue, we have to go back a number of years because this issue that of consideration of immigration status really goes back to a sort of outburst of litigation that occurred primarily in California relating to this issue.

Just by way of background, it's been commonplace for a number of years for creditors to condition the availability or eligibility of credit products on the applicant either being a US citizen or a permanent resident. With the idea being that if someone's not a permanent resident of the United States, it's not reliable that they'll be in the United States to repay the credit obligation over the period of time that it needs to be repaid. Some credit obligations are relatively short and some are very long like a mortgage loan or a student loan. Against that backdrop of industry practice, you started seeing litigation brought in California over this issue.

The litigation first centered on participants in the DACA program, which allowed people to stay in the United States essentially indefinitely, but without being official permanent residents. There

was class action brought against a number of lenders on behalf of classes of DACA participants to basically say that the requirement for someone to be a US citizen or permanent resident was illegal. The legal theory on which those cases were based generally was on 42 USC section 1981 and the California Civil Rights statute called the UNRUH Act. Now, section 1981 is probably familiar to many of the listeners of this podcast because it's a post-Civil War era race discrimination statute, and that's what most people understand it to be and it prohibits race discrimination. But what most people don't know about Section 1981 is it also prohibits discrimination on the basis of alienage or citizenship. These lawsuits that were brought in California were based in part on section 1981.

In addition, they were also based as I said on the California Civil Rights Law, the UNRUH Act, which has a whole slew of protected characteristics under it, including seven or eight years ago, it was amended to add immigration status as a protected characteristic. The claim was that creditors were discriminating on the basis of basically citizenship or immigration status in violation of those two laws. Although the initial lawsuit and class action settlement in this area was brought on behalf of DACA recipients, you started to see an outburst of litigation against a large number of creditors in favor of various groups like asylum seekers or other sort of non-official permanent residents, and we didn't get a lot of decisions in those cases.

There was a motion to dismiss denied in a couple of them. Some of them were dismissed on the basis of standing and so not on the merits, but a lot of them just went to settlement. We didn't really get much development of law from the emergence of that pattern of litigation. It left the industry in a very uncertain place with respect to how to deal with immigration status and credit underwriting. Of course, compounding that confusion is the fact that Regulation B, which is the implementing regulation for the equal credit opportunity, says now and has said for a very long time that it is permissible for a creditor to consider immigration status so that it can determine whether it will have the right and remedy to be repaid on the credit obligation from someone who may not be in the United States, which of course was the rationale for the restriction in the first place that the industry had adopted.

For years, as this litigation unfolded in California and led nowhere in terms of a firm direction for the industry, regulators didn't say anything about it and the federal regulators in particular were conspicuously silent with respect to this issue, and that silence stayed that way until October of this year, 2023 when the Department of Justice and the CFPB issued the joint statement that I referred to at the beginning of the episode.

Let's look at what the joint statement says and see where we've landed on this issue and what we need to do about it. The joint statement warns lenders that, "Unnecessary or over broad reliance on immigration status in the credit decisioning process may be a violation of the Equal Credit Opportunity Act and unspecified other federal laws." Which of course would be Section 1981. What does that mean, unnecessary or over broad?

The agencies go on to say that they think immigration status can overlap with or in certain circumstances may serve as a proxy for other protected characteristics under ECOA like race and national origin. And so they are giving some examples of what they consider to be unnecessary or over broad reliance on immigration status. Let me give you three of the examples that were in this joint statement.

Number one, the agencies talk about as problematic a creditor who has a blanket policy of refusing to consider applications from certain groups of non-citizens regardless of the credit qualifications of those applicants. Let's put a pin in that latter part of that sentence because we're going to come back to it.

Second example, a creditor with a policy of placing “undue consideration” on certain criteria such as how long a consumer has had a social security number, which the agency say may serve as a proxy for citizenship or immigration status, and which in turn may implicate a protected characteristic under the Equal Credit Opportunity Act. We're going to talk about that one in just a minute too.

And third, a creditor who requires documentation, identification, or in-person applications, which by the way was one of the private lawsuits in California, in-person applications were required only from certain groups of non-citizens. The agencies have clearly taken a look at the body of complaints that were filed in these cases and have modeled their joint statement after it. But what does each of these things really mean? Because although we have these examples of a blanket policy of refusing to consider or requiring documentation from certain groups of non-citizens, the agencies give almost no indication of the specifics of how a lender needs to comply with this.

All they do is close the joint statement with the admonition that if a creditor is going to consider immigration status as eligibility criterion for a credit product or frankly probably for other financial products or services too, given the way that the UNRUH Act isn't limited to credit products and that the CFPB wants to apply discrimination to non-credit products under UDAAP, although it's currently enjoined from doing so against a variety of parties, then the agencies recommend that there has to be sort of a well-reasoned, documented and well justified reason that relates to the creditor's rights and remedies to repayment in connection with the credit transaction. What does that mean for us as the consumer financial services industry?

I thought about it a lot in connection, obviously with the litigation that's occurred over the proceeding many years, and we've had many, many creditors who've been left in the lurch of not really knowing what to do following that litigation. I guess we have to ask ourselves, does this joint statement give us any information that we didn't already have? Well, I think it gives us one piece of information, and that is that both the CFPB and the DOJ may be looking for cases to bring either in supervision for the CFPB or in enforcement for either of them, where they believe that immigration status has been inappropriately considered by a creditor. So we know there's now federal regulator attention on this issue, which hasn't been the case for any of the proceeding 5 or 10 years when the litigation has been going on, again, mostly in California.

But in terms of exactly what to do and how to do it, the agencies haven't provided us anything and it's no clearer now in terms of what our conduct should be to stay out of trouble than I think it was from absorbing the body of litigation that occurred in California. We have to make our best guess as to what we can do and what we can't do regarding these kinds of immigration status related attributes or qualifications that creditors may use in connection with credit products. I think creditors really have a choice here of either or both of two measures with respect to this issue. Because creditors, I think, are legitimately worried about credit losses associated with making a loan to someone who's not going to stay in the country. It doesn't make sense that you would make a long-term loan to someone who's here on a tourist visa, for example.

I don't think it's likely that anyone, including the federal regulators, would debate that point. But on the other hand, I think creditors could get in trouble for someone who's lived in the United States for a long time, has an established credit history with U.S. credit reporting agencies, and is denied for what seems like the arbitrary reason of their immigration status even though they've shown they're sort of a long-term person who's residing in this country and will likely be around and has repaid other credit obligations in the past as shown by their existing credit history.

I think creditors have two avenues to consider, and they can do either or both of these things. On the one hand, we can, I think, continue to have certain immigration status requirements and qualifications associated with origination of loan products. If we do that, we're now warned by this joint statement just as we were warned honestly by the litigation, that we need to have carefully considered that those requirements or eligibility criteria are narrowly tailored to achieve whatever we're looking to achieve that is protection from credit losses and they don't go any further than they have to and that we have a documented and hopefully supported by data basis for showing that it's necessary to impose that eligibility criterion on our credit products in order to avoid credit losses or in order to ensure that we have recourse to be repaid if the borrower fails to repay according to the terms of whatever the credit agreement is.

I think even under the joint statement, there is room for creditors to use some immigration related qualifications in connection with credit products. We just have to be careful about it in terms of being in a very good position to argue and defend that they're appropriate and that they're supported by a good acceptable business justification. We, of course, would cross our fingers and hope that the regulators would find that business justification acceptable in a later examination or enforcement investigation.

One thing that I want to point out in connection with that is that one of the examples that's used in the joint statement has to do with how long a consumer has had a social security number. And the thing is, it's true, I think, that we've seen in the past that the CFPB has reacted to that attribute in fraud models or credit scoring models as being a proxy for national origin because they think it will impact adults who got social security numbers after coming into this country as an adult, whereas most people born in the United States get a social security number relatively shortly after they're born. They do consider it that, and we've seen that in supervisory exams with the CFPB going back probably seven or eight years.

But it's nevertheless a relatively common attribute that we see in fraud screening or credit models because at least the data I've seen suggests that people with recently issued social security numbers are much more frequently victimized by identity theft and/or may be involved in other types of fraud that reflect themselves in credit losses that creditors can show. And so, even though it's an example in the joint statement, creditors would have to decide whether to take the risk of using something like that in a fraud scoring model or a credit underwriting model and relying on the data that they hopefully would have to show the clear business justification of that attribute in that it has a very strong relationship with preventing identity theft or first party fraud.

That's a model attribute that's frequently in use that I think anybody who's using it now would be well-served to think about carefully whether to consider using it or not, and if so, to be very prepared to defend it with the data.

But that leads me to the other option for creditors. One of the themes that you see in this joint statement by the two agencies is the idea that there will be someone who's not a permanent resident of the United States or not have a preferred immigration status from a creditor standpoint, but nevertheless will have sufficient credit qualifications to be approved for the credit that they're applying for. I think therein lies the other path to protecting business interests that's still, I think, quite open to creditors even after this statement, and that is to apply to all applicants even-handedly, credit criteria that will probably eliminate people who are only temporarily in the country and who can't be necessarily relied on to be around when repayment is required, particularly if involuntary repayment is involved, and just leave it at that and don't worry about immigration status.

For example, what if a creditor had a requirement that said you have to have a certain number of trade lines on a major credit bureau or a certain amount of time on file with a major credit bureau. Now, those types of criteria if applied even-handedly across the population are likely defensible from the standpoint of both this immigration status issue and more generally with respect to fair lending. There is some business impact to doing it, of course, because then you'll have thin files that you won't be able to approve or no hits that you won't be able to approve. But if you're using a secondary model like a second look model or using some alternative data to try to approve them, then you have to understand, you want to draw the line at that alternative data in a way that will allow you to approve who you want to approve and not approve who you don't want to approve in terms of a credit risk standpoint. Again, hopefully based on empirical data that supports where that line should be drawn.

I do think that creditors do have the option of adjusting their credit underwriting strategy to ensure that they aren't making credit available to people who won't be around to repay it, as shown potentially by the fact that they haven't been in the country for very long and don't have an established record of repaying credit transactions. I think under the language of the statement, if those credit qualifications are applied to everybody, citizens and non-citizens, permanent residents and non-permanent residents alike, then the business may be able to get where it needs to be from a credit risk standpoint without any consideration of immigration status, or there could be a hybrid between those credit rules and then immigration status rules that are less controversial, no tourist visas, for example.

Every creditor has to decide based on their credit product and their applicant population where the right strategy is between those two choices. But I think that's the way forward, at least as far as we can tell it now from the very vague guidance that the Department of Justice and CFPB have just given us at the beginning of October. That's what I wanted to talk to you about today in terms of immigration status. Obviously we're going to have to watch and see as this unfolds in our supervisory experience with the CFPB and then any enforcement experience that we get with the Department of Justice.

But let's not forget that there's still litigation out there on this issue, and I want to remind everybody that the state of New York around a year ago amended its anti-discrimination statute, which is similar to the California one to add immigration status as a protected characteristic. So not only do we have the potential for California litigation on this, we also have the potential for litigation in New York on it too. And although we have not seen it yet because we have those state laws, it is possible that state regulators could get in on this issue as well, like for example, the California Attorney General or the New York Attorney General under the very specific immigration status provisions of their respective anti-discrimination laws. Again, we have not

seen that yet, but it remains a danger that's lurking over the horizon that could eventuate at some point in the future.

We'll continue to watch this issue. We'll report about it on our blog and on this podcast as anything happens. But for now, thanks for listening to me today talk about this very thorny issue that's been plagued in creditors for years. Don't forget to visit and subscribe to our blogs, as I said, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And while you're at it, why don't you go ahead and visit us at Troutman.com and add yourself to our Consumer Financial Services email list. That way we can send you notices of our industry only webinars and the alerts that we periodically send out on important developments in the industry. As I said, head over to your app store and try out our mobile app. You can find it under Troutman Pepper, and I think you'll really like the functionality if you like reading and listening to our thought leadership pieces. And of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.